Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

79-1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

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WINNEBAGO TRIBE OF NEBRASKA,
Petitioner,

vs.

COL. JAMES W. RAY, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY, CORPS OF ENGINEERS, IOWA PUBLIC SERVICE COMPANY, AND NEBRASKA PUBLIC POWER DISTRICT,
Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner failed to carry its burden of proof before the District Court.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

3. Whether there was a major federal action because of alleged illegal segmentation.

4. Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

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OPINIONS

These Respondents accept the Opinions attached to Petitioner's Petition For Writ of Certiorari and contained in its Appendix A and Appendix B.

STATEMENT OF THE CASE

Respondent Nebraska Public Power District (hereinafter cited as NPPD) began planning the construction of a 345 KV transmission line to supply power to northwestern Nebraska in 1975. On September 29, 1977, NPPD met with a representative from the Bureau of Indian Affairs (hereinafter cited as BIA). In that contact NPPD described its intentions to construct the transmission line as well as notices for required public meetings, voluntary meetings, and other general terms regarding the line. Sometime in the early part of October, 1977, NPPD made direct contact with a representative from the Winnebago Tribe of Nebraska. Therefore, since October, 1977, both the BIA and the Winnebago Tribe of Nebraska have been fully aware of the intent of NPPD to construct a 345 KV transmission line from Raun, Iowa, to Hoskins, Nebraska.

Public meetings, both voluntary and those required by statute, were held by NPPD in the counties where the transmission line would pass. One of said meetings was held in Winnebago on October 11, 1977. NPPD held this voluntary meeting for the purpose of securing input from the Winnebago Indians as to the route of the line as it would cross the reservation, as well as any other problems the line would present to the Indians themselves. Other meetings were held in other counties for the same purpose of receiving input from the public at large as to any problems the transmission

line would pose to surrounding communities. In December of 1978 and January of 1979, contracts were let and awarded to the contractor for the construction of the transmission line as well as materials needed for said construction.

The proposed transmission line runs from Raun, Iowa to Hoskins, Nebraska. This distance is some 65 miles which includes crossing of the Missouri River. Additionally, this project is a joint venture between NPPD and Iowa Public Service Company (hereinafter called IPS). Because the transmission line crosses the Missouri River, it was decided that IPS would be responsible for building and stringing the transmission line from the Raun, Iowa substation to the west bank of the Missouri River on the Nebraska side. In crossing the river, a permit is required by the River and Harbor Act of 1899, 33 U.S.C. 403. Therefore, IPS compiled the necessary information for appellee United States Army Corps of Engineers (hereinafter called Corps). The application for a permit to cross the Missouri River was filed with the Corps on July 13, 1978. On January 29, 1979 a permit was given to IPS to construct and maintain a 345 KV overhead transmission line over the Missouri River. In the application submitted by IPS was an environmental assessment questionnaire that was filled out by IPS regarding the environmental impact this construction would have on and around the Missouri River crossing site. Noted in that questionnaire, was the existence of a 345 KV transmission line crossing the river approximately 150 feet to the south of the proposed crossing. Construction of the river crossing has been totally completed.

Negotiations for the right of way acquisitions for Thurston County began on or about November 23, 1978.

In Thurston County, where the Winnebago reservation is located, 69 percent of the right of way had been acquired by the time of trial. Right of way costs to date of trial were $1,290,000.00, of which $469,000.00 had been spent in Thurston County. There are 31 or 32 tracts of land on the Winnebago reservation currently under condemnation.

Actual construction of the transmission line began in the area in question on the 26th of February, 1979. The transmission line was to be constructed from the Missouri River west to Hoskins, Nebraska. The reason for the construction to proceed in that direction was due to agricultural production of the area. As of May 1, 1979, NPPD was committed to just slightly over $10,000,000.00. Because of the delay and the costs incurred to reroute the transmission line or move the materials to other locations, the cost of the project has increased by some $2,000,000.00. A complete reroute of the line would require an additional two years to complete the project, but from the evidence brought forth during the trial, the power needs of northeastern Nebraska cannot wait an additional two years to receive the power from this transmission line.

Not until the construction of the power line had reached the borders of the Winnebago reservation did the Petitioner bring forth any of the general allegations set out in its Complaint to the District Court. Sometime in February of 1979, the Winnebago Indians mentioned their concerns regarding the bald eagle. At no time during the planning of the proposed transmission line did the Petitioner manifest any concern over the environment and specifically the bald eagle to either of these Respondents. This suit was filed on April 30, 1979, approximately one week after the Win-

nebago Tribe of Nebraska was informed of the condemnation proceedings that would be brought against allotted lands.

The Winnebago Tribe of Nebraska brought suit challenging the Army Corps of Engineers negative declaration and the issuance of a permit to the Iowa Public Service Company allowing the crossing of the Missouri River with a 345 KV high-voltage transmission line. Petitioner sought temporary and permanent injunctive relief pending compliance with the National Environment Policy Act. A consolidated trial on the merits began on May 21, 1979. The Trial Court held on June 15, 1979, that Petitioner had failed to meet its burden of proof and dismissed the Complaint. Appeal was brought to the United States Court of Appeals for the Eighth Circuit, and, on March 13, 1980, the Eighth Circuit affirmed the trial court by holding that the tribe had failed to meet its burden of raising a substantial environmental issue.

SUMMARY OF ARGUMENT

1. Whether the Petitioner failed to carry its burden of proof before the District Court.

The Petitioner had the burden of proof to demonstrate the existence of a substantial environmental issue. The Petitioner chose to plead and, therefore, prove there existed a substantial environmental issue because of the threat of high-voltage transmission lines to American bald eagles. The record demonstrates that the Petitioner failed to substantiate its claim. There was no evidence introduced that would indicate an additional high-voltage transmission line will be a threat to the

existence and proliferation of the American bald eagle.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

There is a general maxim that holds that an appellate court can review only questions of law and not questions of fact. On appeal, fact findings of the trial court in cases tried without a jury are to be given the same effect or weight as jury verdicts, and such findings of fact will not be disturbed or reversed other than for reasons that would justify interference by the appellate court with jury verdicts. Appellate courts have held that the trier of fact is in a superior position to review evidence adduced at trial. The trial court can make a determination based upon such evidence better than an appellate court based solely upon the record.

3. Whether there was major federal action because of alleged illegal segmentation.

The District Court applied the standard of judicial review and found that the Corp's administrative record, as demonstrated by the extrinsic evidence, was sufficient to support a negative declaration statement. Petitioner did not present evidence that the project should be adjudged to have a significant environmental impact. Therefore, the District Court acted properly in finding that even if the Petitioner had met its burden of proof, the alleged deficient record did not exist after reviewing the extrinsic evidence.

4. Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

Petitioner has failed to show in its Petition For Writ Of Certiorari that the decision of the Eighth Circuit in this case is in conflict with any other Circuit. Secondly, there is no showing by Petitioner that the Eighth Circuit has far departed from accepted judicial proceedings or sanctioned such a departure by the District Court.

ARGUMENT

I.

Whether the petitioner failed to carry its burden of proof before the District Court.

It has been unequivocally held that it is incumbent upon a plaintiff to make a prima facie showing and raise a "substantial environmental issue." This burden of proof is a threshold requirement that triggers the court to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency acted reasonably. In *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457, 490 (D. Kan. 1978), the Court succinctly articulated what the duty of the court should be in reviewing an environmental issue. This case was a class action suit brought by the plaintiff's seeking a permanent injunction. The District Court held, *inter alia,* that the plaintiffs lacked standing. Relief was denied. In addressing the burden of proof issue, the Court held:

> A court should not undertake to review the decision not to file an EIS unless the plaintiff is

> able to raise a "substantial environmental issue." . . . Plaintiffs must allege facts which, if true, would constitute a "substantial" impact upon the environment.

Id. at 490 (citations omitted).

Petitioner claims to have shown three issues: (1) the segmentation and complete omission of environmental consideration of 98% of the project; (2) a failure to consider real alternatives; and (3) the threat of high-voltage transmission lines to bald eagles. The last issue is the only issue, of the three, that addresses itself to an environmental question. The first two "issues" the petitioner raised address themselves to whether or not the Corps acted reasonably by issuing a Section 10 permit along with a negative declaration statement. These particular issues are to be addressed only after a plaintiff has established a substantial environmental issue. *Hiatt Grain & Feed, Inc., supra,* articulated a two-step process of review. Before a district court can review a decision not to file an EIS, it first must determine if the plaintiff has raised a "substantial environmental issue." Then, once a substantial environmental issue is raised, the court can then address itself to whether an EIS is necessary. The petitioner in its argument integrates questions regarding the propriety of the Corps' actions with whether a substantial environmental issue exists. Therefore, the segmentation issue and the failure to consider alternatives are to be reviewed after the petitioner has completed the first step of carrying the burden of proof. This leaves the threat of high-voltage transmission lines to bald eagles as the only issue the petitioner raised to demonstrate a substantial environmental issue.

From the evidence adduced during trial, it was obvious that the petitioner failed to raise a substantial environmental issue in regard to the American bald eagle. Evidence demonstrates that the Corps did consider several different varieties of birds, but failed to specifically comment upon the American bald eagle. Petitioner had an opportunity during the trial to introduce evidence that would sustain its claim that the American bald eagle would be substantially harmed by the project. This, the petitioner failed to do.

Presently, there exists, and has existed since 1968, a high-voltage transmission line that runs parallel, only 150 feet apart, from the proposed transmission line. The existing transmission line runs approximately one mile west of the river, parallel to the proposed line, then goes two miles south, and then one mile west before the lines separate. With the existence of a high-voltage transmission line, there existed an opportunity for the petitioner to measure the damage or harm to the environment (including American bald eagles). However, no such evidence was submitted depicting any substantial impact that the existing high-voltage transmission line has caused, or what an additional high-voltage transmission line may cause upon the environment. Petitioner charged that the Corps failed to consider the environmental consequences because the assessment neglected to consider the local eagle population around the river as well as hunting and nesting grounds. This argument does not raise a substantial environmental issue because the evidence does not show that the eagle has been, nor will be, impacted by the construction of the proposed transmission line. There is no evidence to indicate why the Corps should consider the American bald eagle any differently than it considered the other species of birds addressed in its

negative declaration. Furthermore, there is no evidence that the American bald eagle is found to roost within two to three miles of the river crossing. And there is no evidence that the American bald eagle is found in the vicinity of the line route within the borders of the reservation.

Petitioner claims to have established that there have been dead bald eagles found along the Missouri River from *both* Iowa and Nebraska sides of the river. The testimony of Dr. Louis Locke, a wildlife pathologist for the U.S. Fish and Wildlife Service, did not indicate that dead bald eagles were found along the Missouri River on the Nebraska side. Furthermore, Dr. Locke's testimony only established that somewhere along the Missouri River, as it parallels the Iowa border, dead eagles were found. Dr. Locke did not indicate that any American bald eagles have ever been found in the area of the proposed transmission line.

II.

Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by applicable standards of review.

An appellate court can review the findings of fact by the lower court, but it cannot disturb these findings unless they are contrary to, or inconsistent with, or without support of the evidence. In other words, the appellate court should not disturb a finding of fact, unless it is clearly wrong or clearly against the weight of the evidence. This does not mean, however, that the appellate court has an unrestricted power to dis-

turb fact findings of the trial court. To the contrary, it has been held in many jurisdictions that where review in a non-jury case is of the entire record, the court may review the sufficiency of the evidence and test the propriety of the findings below, excepting findings sufficiently supported by the record and a product of orderly and logical deductive process, even though it might have reached different conclusions. 5A C.J.S. Appeal & Error § 1656 (1)(2)(3).

During the trial on the merits the trial judge was faced with many questions of fact. Based upon the evidence adduced at trial, the trial judge was able to come to the proper conclusions of fact, overruling the petitioner's request for an injunction. Now, the petitioner comes before this Court raising some of the same questions of fact claiming that the trial judge erred in his conclusions. To overrule the lower court's findings, this Court must determine that these findings were contrary to, or inconsistent with, or without support of the evidence.

The first question of fact at issue was whether the Corps' issuance of a negative declaration was unreasonable and amounted to an arbitrary and capricious action. The standard of review as correctly applied by the District Court was the rule of reasonableness. This was demonstrated in *Minnesota Pub. Interest Research Group v. Butz,* 498 F. 2d 1314, 1320 (8th Cir. 1974) which was an action by a non-profit corporation seeking injunctive relief against logging. The Court found that the activities constituted major federal action so that an impact statement was required.

Petitioner urges that the issuance of the negative declaration was unreasonable because the Corps only

assessed the river crossing area. Petitioner argues that the entire length of the transmission line from Raun, Iowa, to Hoskins, Nebraska, should have been considered before the Corps could issue the negative declaration. It was clearly demonstrated by the respondents that the Corps acted consistently within its power of review by restricting its assessment to the river crossing, wherein it receives its jurisdiction by the River and Harbor Act of 1899, 33 U.S.C. § 403.

The District Court found that the Corps acted within the scope of its authority by evaluating only the river crossing. This conclusion was based upon the evidence presented before the trier of fact and was evaluated by him using the standard of "reasonableness". The District Court did not find that the Corps was acting in an arbitrary or capricious manner in only assessing the river crossing because there was no evidence introduced that would show a need for the Corps to assess areas west of the river crossing. It was clearly supported by the evidence that it would have been unreasonable for the Corps to expand its scope of the assessment to include areas west of the river crossing. It would be unreasonable to have that federal agency assess an area some 60 miles from its primary jurisdiction, the river. This is especially true when the area presently possesses five to six high-voltage transmission lines, and there was no evidence presented that these lines have ever killed or injured an American bald eagle.

The second question of fact is whether the issuance of a Section 10 permit is a "major federal action." The District Court clearly demonstrated in its Memorandum Opinion that it was fully versed on the proper standards of review regarding the National Environ-

mental Policy Act, 42 U.S.C. § 4321, *et seq.*

The standards which automatically trigger a formal EIS are: (1) a major federal action; and (2) a significant effect on the quality of the human environment. The District Court carefully dissected the facts to determine whether there existed a major federal action. Major federal action occurs when a federal agency is deeply involved in a particular project and/or the project is financed by federal funding. This was unequivocally held in *Indian Lookout Alliance v. Volpe,* 484 F. 2d 11, 14, (8th Cir. 1973). That was an action regarding a highway construction project that was found to be improperly segmented so as to avoid assessing the entire project.

In the case at bar it is undisputed that there is no federal financing involved which would trigger major federal action. However, petitioner urges that the involvement of the Army Corps of Engineers is of such a magnitude that this involvement in and of itself constitutes a major federal action. These respondents strongly oppose such a proposition and the District Court affirmed the Respondent's position.

To constitute a major federal action when no federal funding exists, as in the instant case, the federal agency's involvement must be substantial. If the federal agency's involvement is minor, then according to *Dalsis v. Hills,* 424 F. Supp. 784 (W.D.N.Y. 1976), there must be federal funding to effectuate major federal action. *Dalsis* was an action wherein the plaintiffs were seeking an injunction to cause the builder of a proposed shopping mall to acquire an environmental impact statement. The Court found there was major federal action, but denied the plaintiffs' motion for a

lack of showing that irreparable harm would result.

The District Court properly found that the Corps' involvement was minor. The crossing of the Missouri River is the only triggering device that causes any federal action. If the river crossing was not necessary, there would be no question regarding federal involvement. The trier of fact found that the transmission line was not illegally segmented at the river crossing so as to avoid having to comply with NEPA and thereby having to compile an EIS on the river crossing as well as one on the entire line. It was brought forth by the evidence that due to the nature of the construction and the standards of the industry, IPS would build and string the transmission line across the Missouri River to the Nebraska side. It is impossible for the power lines to be connected by the two companies midway between the east and west banks of the Missouri River. Therefore, since the line was not illegally segmented, the only federal action occurred with the issuance of the Section 10 permit. This involvement by the Corps was found by the District Court to be a minor aspect of the project.

The District Court's findings of fact should be unequivocally upheld by this Court. This conclusion is based upon the fact that the evidence clearly substantiates and supports the trier of fact's conclusions. These conclusions cannot be disturbed because they are not contrary to, or inconsistent with, or without support of the evidence. There is no major federal action existing in the project to construct the proposed 65-mile transmission line. Furthermore, the District Court properly reviewed the evidence regarding the negative declaration and applied the standard of reasonableness to that evidence. In that light the trier of

fact found that the Corps had acted properly and had not issued the permit arbitrarily or capriciously. There is not sufficient evidence for this Court to disturb the District Court's fact findings and the same should be regarded as conclusive and binding.

III.

Whether there was a major federal action because of alleged illegal segmentation.

Petitioner alleges impropriety in the method used by the respondents, NPPD and IPS, wherein they designated each company's responsibility, for the construction of the line from beginning to end. These respondents assert that this allegation is totally without foundation. The evidence adduced at trial demonstrated the proper standards of the industry regarding how responsibility is to be designated when two companies contract for the construction of a single project. IPS by its own volition, and without any illegal intention, contracted that it would construct the power line from its own substation in Raun, Iowa, to the west bank of the Missouri River. There is no evidence that would indicate that this contract with NPPD was improper or illegal so as to avoid having to compile an EIS on the entire line.

This District Court has already demonstrated that it can recognize when someone has illegally segmented a project so as to avoid having to compile an EIS. The Court demonstrated this ability in *Patterson v. Exon,* 415 F. Supp. 1276 (D. Neb. 1976). This was a highway construction project where it was found that the defendant illegally segmented a construction project

so as to avoid having to compile an EIS. The District Court Judge, the trier of fact in that case, presided over the instant case. This particular set of circumstances shows that if illegal segmentation had occurred, the trier of fact would have sustained such a violation.

Since the Trial Judge did not find the project to constitute a major federal action, he still reviewed the question of whether the Corps had issued a negative declaration, stating that an EIS was unnecessary. To review the process in which the Corps arrived at its determination, the District Court applied the principles set forth in *Pokorny v. Costle,* 464 F. Supp. 1273 (D. Neb. 1979). *Pokorny* was an action by a city's mayor to restrain construction of a city project. The ground for the injunctive relief was that the Environmental Protection Agency's decision to refrain from preparing an EIS was unreasonable. The District Court held that the EPA did not act unreasonably and denied injunctive relief. In that holding, the Court clearly set forth the standards of judicial review to be applied when the Court is faced with determining the reasonableness of a federal agency's actions. After setting out the burden of proof to be demonstrated by the plaintiff to raise a substantial environmental issue, the Court held:

> Upon a prima facie demonstration of an incomplete development of a written record by a federal agency, extrinsic evidence may be considered in a judicial evaluation of the reasonableness of an administrative decision to issue a negative declaration.

Id. at 1276. Therefore, if a plaintiff demonstrates the existence of a "substantial environmental issue" because of a deficiency in the negative declaration, as

alleged by the petitioner in the instant case, the court's inquiry is not limited to the allegedly deficient administrative record. The policy behind allowing the judge to turn to the extrinsic evidence was articulated also in *Pokorny*:

> The policy behind requiring a succinct evaluation of a project's environmental impact rather than a detailed statement is related to the degree of significance. Environmental protection would not be served by requiring an EIS when a project is insignificant within the meaning of NEPA.

Id. at 1277.

The District Court applied this standard and found that a negative declaration was proper. The District Court further found that even if the record had been deficient, the extrinsic evidence showed that the petitioner could not meet its burden of proof.

At this time the river crossing has been completed and the issue should be considered moot.

IV.

Whether any of the reasons set forth in Rule 17 of the Supreme Court of the United States are present to confer a review of this case.

Rule 17 notes that a review on a Writ of Certiorari is not a right. It specifies that this Court will consider a matter for review only under certain important circumstances.

In general terms, as applied to this case, there would have to be a conflict of opinion with another

Court of Appeals or a matter would have to be under consideration which had not been previously decided by this Court. In addition, this Court will review a decision if a Court of Appeals has made a great departure from the usual course of judicial proceedings or allowed a District Court to do so.

It is true that Rule 17 indicates that these guidelines are not the full measure of this Court's discretion. However, this Court should strictly apply these guidelines with regard to this case. This case does not involve any unique federal questions or issues that are being treated differently among various Courts of Appeals. The United States District Court for the District of Nebraska simply applied established standards and refused to grant the Petitioner injunctive relief on the basis that the Petitioner had failed to carry its burden of proof. There were various factual determinations that had to be made by the District Judge. These factual decisions were made. Review of a case based solely upon factual decisions made by the District Judge in an injunctive action is not appropriate under the guidelines set forth by Rule 17.

CONCLUSION

The Trial Court clearly acted properly as did the Eighth Circuit and their decisions should be affirmed. The Petitioner failed to carry its burden of proof because it could not demonstrate the existence of any substantial environmental issues. The Corps' action was correct in issuing a negative declaration. An EIS is not necessary because there is no major federal action significantly affecting the quality of the human en-

vironment. The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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